ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 4, 2013

Mr. Ken Campbell
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P.O. Box 26300
Austin, Texas 78755-6300

OR2013-00205

Dear Mr. Campbell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 475465 (File No. 019.18909).

The Bastrop County Emergency Services District No. 1 (the "district"), which you represent, received a request for e-mails sent, received, or deleted for all district commissioners, paid firefighters, maintenance technicians, and administrative staff since August 1, 2011.[1] You state e-mail addresses will be redacted pursuant to the previous determination issued under section 552.137 of the Government Code in Open Records Decision No. 684 (2009).[2] You claim most of the remaining requested information is excepted from disclosure under sections 552.107(1) and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.[3]

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[1]We note the requestor clarified the time period to which the request pertains. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information).

[2]Open Records Decision No. 684 is a previous determination issued by this office authorizing all governmental bodies to withhold specified categories of information without the necessity of requesting a decision under the Act, including an e-mail address of a member of the public under section 552.137. *See* ORD 684 at 14-15.

[3]This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

We first note the district sent the requestor an estimate of the cost of providing the submitted information. *See* Gov't Code § 552.2615(a). You do not indicate whether the district has received a response to the cost estimate. *See id.* § 552.2615(b). We have examined the submitted cost estimate, however, and determined it does not comply with the provisions of section 552.2615 of the Government Code. Thus, the present request for information has not been withdrawn by operation of law, because the requestor has not received a cost estimate for providing that information that complies with section 552.2615. Therefore, the district must generally release the submitted information unless it falls within the scope of an exception to disclosure.

We also note some of the submitted information was created either prior to August 1, 2011 or subsequent to the district's receipt of the present request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.[4] Thus, the submitted information that was created prior to August 1, 2011, or subsequent to the district's receipt of the request is not responsive to the request. This decision does not address the public availability of that information, which we have marked, and the district need not release that information in response to the request.

Next, we address your representations with regard to the portion of the present request that seeks access to deleted e-mails. We note computer software programs generally keep track of the location of files by storing the location of data in the "file allocation table" (FAT) of a computer's hard disk. The software then displays the file as being in a specific storage location. Usually, but not always, when a file is "deleted," it is not actually deleted, but the display of its location is merely shown to be moved to a "trash bin" or "recycle bin." Later, when files are "deleted" or "emptied" from these "trash bins," the data is usually not deleted, but the location of the data is deleted from the FAT. Some software programs immediately delete the location information from the FAT when a file is deleted. Once the location reference is deleted from the FAT, the data may be overwritten and permanently removed. You state "[t]he [d]istrict is in possession of no documents responsive to this request, other than those provided herein." Thus, we understand you to state the locations of any "deleted" e-mails have been deleted from the FAT systems of the district's computers. We therefore conclude any such e-mails were no longer "maintained" by the district at the time of the present request and do not constitute public information subject to disclosure under the Act. *See id.* §§ 552.002 (public information consists of information collected, assembled, or maintained by or for governmental body in connection with transaction of official business), .021; *Econ. Opportunities Dev. Corp. v. Bustamante,* 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd). Thus, the Act does not require the district to release any such information.

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[4]*See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

You claim the submitted responsive information is excepted from disclosure under sections 552.107(1) and 552.111 of the Government Code. Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

We understand you to claim section 552.107(1) is applicable to the responsive information you have marked in Exhibit C. You state the marked information consists of communications between attorneys for and representatives of the district made in connection with the rendition of professional legal services to the district. You have generally identified the parties to the communications. You state the communications were intended to be and remain confidential. Based on your representations and our review, we conclude the district may generally withhold the marked responsive information under section 552.107(1) of the Government Code. In this instance, however, some of the submitted e-mail strings include e-mails received from or sent to non-privileged parties. Moreover, if the submitted e-mails received from or sent to non-privileged parties are removed from the e-mail strings and stand alone, they are responsive to the present request for information. Therefore, to the extent the

non-privileged e-mails we have marked are maintained by the district separate and apart from the otherwise privileged e-mail strings in which they appear, the district may not withhold the non-privileged e-mails under section 552.107(1) of the Government Code.

Section 552.111 of the Government Code excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency[.]" Gov't Code § 552.111. This exception encompasses the deliberative process privilege. *See* Open Records Decision No. 615 at 2 (1993). The purpose of this privilege is to protect advice, opinion, and recommendation in the decisional process and encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions reflecting the policymaking processes of the governmental body. *See* ORD 615 at 5. A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (Gov't Code § 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

We note section 552.111 can encompass communications between a governmental body and a third party. *See* Open Records Decision Nos. 631 at 2 (1995) (Gov't Code § 552.111 encompasses information created for governmental body by outside consultant acting at governmental body's request and performing task that is within governmental body's authority), 561 at 9 (Gov't Code § 552.111 encompasses communications with party with which governmental body has privity of interest or common deliberative process), 462 at 14 (1987) (Gov't Code § 552.111 applies to memoranda prepared by governmental body's consultants). In order for section 552.111 to apply, the governmental body must identify the third party and explain the nature of its relationship with the governmental body. Section 552.111 is not applicable to a communication between the governmental body and a third party unless the governmental body establishes it has a privity of interest or common deliberative process with the third party. *See* ORD 561 at 9.

Although you also generally contend section 552.111 is applicable to the remaining responsive information you have marked in Exhibit C, you have not demonstrated any of the

non-privileged e-mails we have marked contain advice, opinions, or recommendations that implicate the district's policymaking processes. Therefore, to the extent those e-mails are not excepted from disclosure under section 552.107(1) of the Government Code, we conclude the district may not withhold any of the information in the non-privileged e-mails under section 552.111 of the Government Code.

In summary, the responsive information you have marked in Exhibit C may generally be withheld under section 552.107(1) of the Government Code, but the non-privileged e-mails we have marked may not be withheld under section 552.107(1) or section 552.111 of the Government Code and must be released to the extent they are maintained separate and apart from the e-mail strings in which they appear. The district must release the rest of the responsive information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

James W. Morris III

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/bhf

Ref: ID# 475465

Enc: Submitted documents

c: Requestor
(w/o enclosures)